No. 10,709

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN S. NICHOLS, *Appellant,*

vs.

J. J. NEWBERRY COMPANY, a Corporation, *Appellee.*

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

HONORABLE L. B. SCHWELLENBACH
United States District Judge

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PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellant, a citizen of the State of Washington, instituted an action against defendant, a corporation foreign to the State of Washington.

Plaintiff alleged damage to his reputation and feelings as a result of the libelous publication by defendant and its agents of a photograph purporting to charge the plaintiff with being a "check artist."

Plaintiff prayed for judgment against defendant in the sum of $50,000.

The cause was tried to the Court sitting with a jury,

and resulted in a verdict for defendant and an entry of a judgment of dismissal of plaintiff's action, and the assessment of the costs of trial against him.

Plaintiff appeals from said judgment of dismissal to this Court. The District Court had jurisdiction under Title 28 U. S. C. A. Section 41, 43 Stat. 972.

Pleadings necessary to show the existence of the jurisdiction are the amended complaint (R-2) and the answer to the amended complaint (R-9). Defendant's trial amendment of its answer (R-12, 14a) and the reply to the answer as read by the trial judge (R-14a).

STATEMENT OF THE CASE

This is a libel suit in which plaintiff sought damages for the libelous publication of a photograph of plaintiff by defendant in which plaintiff is referred to as a "check artist."

Plaintiff is a married man with three children residing with them and his wife in the City of Spokane, Washington. He had resided in the City of Spokane for many years (R-30).

Defendant owns and operates as a part of a chain system, nation-wide in scope, a five and ten cent notion store in the City of Spokane, Washington, in which, at the time with which this action is concerned, an average of 60 girls per day were employed as clerks, and as many as 180 girls were employed during each holiday season (R-24, 25). The employee personnel was not constant

in defendant's store, but there was a rapid turnover of employees (R-23).

Defendant maintained in its store a restroom for employees. In this restroom a matron maintained a desk surrounded by a wire netting or screen, referred to as a cage and upon the cage the defendant had placed a large placard (Plf's. Ex. A) purporting to show the photographs of various forgers and other criminals. On this placard the plaintiff's picture appeared with a police number and caption, "check artist" (R-22, 23). This placard was placed in a portion of the ladies' restroom where it was in the view of every employee who came into the restroom or any other person, such as workmen, janitors or customers who might use the restroom.

This placard remained on exhibition in plaintiff's restroom from the spring of 1941 to September, 1942 (R-25, 26).

Three of defendant's employees who testified in the case had personal acquaintance with the plaintiff and his family (R-14b, 20, 22).

Witness Frances Mohney (R-20) testified that she was an employee of defendant; that she saw plaintiff's picture under the caption, "check artist," and that because of seeing the picture displayed in the restroom of the defendant's store where she was employed, she believed that it was probably true that plaintiff was a "check artist."

Witness Jane Pierce (R-15) testified that she knew

the plaintiff, and that she saw his picture with the caption, "check artist," in the restroom of defendant's store where she was employed.

Witness Helen Coffee (R-22) testified that she was employed by defendant, that she saw the plaintiff's picture, and that she had been acquainted with plaintiff and his family and recognized the picture as being that of plaintiff.

Plaintiff proved that he had never been convicted of being a "check artist" or of any offense whatever. That he had at one time been arrested on a false charge which was later dismissed when the guilty party, one Forman, entered a plea of guilty. This arrest of plaintiff took place on April 17, 1941 (R-31). The plea of guilty by Forman took place in June, 1941.

The placard containing plaintiff's picture with the caption, "check artist," remained on display in defendant's store for a period of approximately 15 months after the conviction of Forman and the dismissal of the charges against plaintiff.

None of the employees engaged as clerks in defendant's store had any duty or interest with respect to the cashing of checks, and they were not permitted to accept checks from any customer. When checks were offered, the clerks were required to refer the customer to the cashier at the Information Desk (R-20). Testimony of Waltman, store manager (R-26).

Trial was had to the Court sitting with a jury and

resulted in a verdict for defendant. From the judgment entered thereon, following denial of motion for new trial, plaintiff has appealed.

SPECIFICATIONS OF ERROR

I.

The Court erred in entering a judgment upon the verdict and in favor of appellee (R-45, 46).

II.

The Court erred in sustaining an objection to the testimony of witness, Jean Pierce, that she had told various persons of the presence of the photograph of appellant in the defendant's store wherein he was portrayed as a "check artist" (R-15).

III.

The Court erred in sustaining an objection to the testimony of plaintiff's witness, Ray Mohney, respecting whether the witness knew the picture of plaintiff had been placed in defendant's store (R-28).

IV.

The Court erred in sustaining an objection to the testimony of plaintiff's witness, Ray Mohney, respecting whether the witness had been informed that the picture of plaintiff had been posted in defendant's store (R-28).

V.

The Court erred in sustaining an objection to the tes-

timony of plaintiff's witness, Ray Mohney, respecting whether the witness had told other persons about plaintiff's picture being placed in defendant's store (R-29).

VI.

The Court erred in sutaining an objection to the testimony of plaintiff's witness, A. S. Mott, with respect to the witness having been informed that the picture of plaintiff had been posted in defendant's store (R-29).

VII.

The Court erred in sustaining an objection to the testimony of plaintiff's witness, A. S. Mott, respecting the knowledge of the witness that the charges against plaintiff had been subsequently dismissed (R-30).

VIII.

The Court erred in overruling an objection to the testimony of defendant's witness, E. J. Hummer, wherein he stated that the plaintiff was the party against whom he had made a complaint (R-36, 37).

IX.

The Court erred in overruling an objection to the testimony of defendant's witness, Richard Dunning, who was Secretary of the Retail Trade Bureau of the Spokane Chamber of Commerce, and who testified that the photograph of plaintiff, wherein he was portrayed as a "check artist," had been received from the Police Department of the City of Spokane, and in turn delivered by him to defendant and other merchants (R-37, 38).

X.

The Court erred in overruling appellant's motion for new trial (R-50).

XI.

The Court erred in denying appellant's motion to set aside the verdict and for judgment n. o v. for plaintiff.

XII.

The Court erred in refusing to give the Instruction No. 3 requested by the appellant which reads as follows:

> "You are instructed that you must distinguish between the evidence which has been introduced by the defendant for the purpose of establishing the truth of the publication and that which was introduced by the defendant for the purposes only of mitigating or lessening the damages. You are instructed that where a publication of the character of that complained of by the plaintiff is falsely made, the right of the plaintiff to recover damages by reason of such publication is absolute and the only question which remains for the jury to determine, if they find the defamatory matter, or any part thereof, pertaining to plaintiff to be false, is the amount of damages to which under all of the circumstances shown by the evidence the plaintiff is entitled."

XIII.

The Court erred in refusing to give Instruction No. 5 requested by the appellant which reads as follows:

> "I further instruct you that if you find that the defendant has failed to sustain its burden of proving that the defamatory matter complained of was true, then you must find for the plaintiff and the

fact that defendant may have received the defamatory matter from some other person or agency does not excuse or relieve defendant from liability.

XIV.

The Court erred in refusing to give Instruction No. 9 requested by the appellant which reads as follows:

"I further instruct you that one who publishes defamatory matter is liable for the injurious consequences of the repetition thereof by third persons where such repetition is the natural and probable result of the original publication. 33 Am. Jur. Sec. 197, p. 185.

XV.

The Court erred in refusing to give Instruction No. 11 requested by the appellant which reads as follows:

"You are instructed that if you find that the defamatory matter complained of was untrue, nevertheless, if you also find from the evidence that the said defamatory matter was published without malice on the part of defendant, but in good faith, believing it to be true, then in that case your verdict should be confined to the actual damages sustained by plaintiff, because in this state malice is not an essential element of civil libel and plaintiff may obtain a recovery even though defendant may have acted in good faith. *Wilson v. Sun Pub. Co.,* 85 Wash. 503 148 Pac. 774.

XVI.

The Court erred in refusing to give Instruction No. 13 requested by the appellant which reads as follows:

"I instruct you further that the defendant has the burden of proving the defamatory matter true

and that this proof must be as broad as the charge; that is to say, in this case, the defamatory matter complained of charges the plaintiff with having committed the crime of forgery. The defendant, therefore, in order to sustain its burden of proving the libel true must prove that the plaintiff was convicted of the crime charged. It is for you to say whether the defendant has sustained this burden of proof. 103 Kansas 192, 173 Pac. 414, L. R. A 1918 F. 153."

XVII.

The Court erred in refusing to give Instruction No. 14 requested by the appellant which reads as follows:

"I instruct you further that it is no defense that the defendant may have published the libel complained of in good faith or in the absence of malice, nor may good faith on the part of the defendant or the absence of malice be considered by you in mitigation of damages. *Carey v. Hearst Publications*, Vol. 119, No. 16, Wash. Decisions page 997."

XVIII.

The Court erred in predicating his memorandum decision, indicating a denial of plaintiff's motion for new trial, upon certain portions of and passages from an opinion rendered in another case pending in the same court entitled *Holden v. American News Company*, 52 Fed. Supp. 24, for the reason that this method of duplicating memorandum decisions by partial references is confusing and uncertain, and leaves the premises upon which the Court's conclusion apparently is reached in doubt since the facts, relationship of parties and issues joined by pleadings and evidence in this case and the so-called Holden case are diametrically opposite in every respect.

XIX.

The establishment of a qualified privilege in the instant case, based upon the discussion of the Court in its opinion in the Holden case, when the libel is confessedly false and libelous *per se* is erroneous and not in keeping with any of the late decisions of the Supreme Court of Washington.

SUMMARY OF ARGUMENT

1. Malice is not an essential element to be proven in a civil action for libel, and the good faith of the defendant in publishing a libel is not a legal defense under the latest decisions of the Supreme Court of the State of Washington.

2. Under the decisions of the Supreme Court of Washington there is no privilege in libel cases where the published article is libelous *per se* and is not proven to be true.

3. The Court committed reversible error in refusing to permit plaintiff to introduce testimony respecting the circulation and repetition by third persons of the libel complained of.

4. Testimony tending to show appellant had been arrested and that plaintiff's Ex. A was delivered to respondent by the Spokane Police Department was incompetent and should not have been admitted.

5. The latest decisions of the Supreme Court of the State of Washington contain the law applicable to this case and are binding upon the United States District Court for the Eastern District of Washington.

ARGUMENT

1 and 2

Plaintiff requested the Court to instruct the jury that, even though the libelous matter was published without malice and in good faith by the defendant, nevertheless, if the defamatory matter was untrue, the jury should find for the plaintiff as malice is not an essential element of civil libel and the good faith of the defendant could not preclude a recovery by the plaintiff. Plaintiff's requested instructions 11 and 14 read as follows:

Instruction 11

> "You are instructed that if you find that the defamatory matter complained of was untrue, nevertheless, if you also find from the evidence that the said defamatory matter was published without malice on the part of defendant, but in good faith, believing it to be true, then, in that case your verdict should be confined to the actual damages sustained by plaintiff, because in this state malice is not an essential element of civil libel and plaintiff may obtain a recovery even though defendant may have acted in good faith. *Wilson v. Sun Pub. Co.*, 85 Wash. 503."

Instruction 14

> "I instruct you further that it is no defense that the defendant may have published the libel complained of in good faith or in the absence of malice, nor may good faith on the part of the defendant or the absence of malice be considered by you in mitigation of damages.
>
> 33 Am. Juris. Sec. 272, p. 256;
>
> Wigmore on Evidence, Sec. 74, 90 A. L. R. 1169."

The Court refused to so instruct and further instructed the jury that the plaintiff had the burden of proving malice in order to recover (R-38h). It is respectfully submitted that this was an erroneous statement of the law, and that plaintiff's requested instructions 11 and 14 embraced the true rule as shown by the following authorities which are submitted in support thereof:

Ziebell v. Lumberman's Printing Co., 14 Wash. (2d) 261;

Blende v. Hearst Publications, 200 Wash. 426, 93 Pac. (2d) 733, 124 A. L. R.;

Hollenbeck v. Post-Intelligencer Co., 162 Wash. 14, 297 Pac. 793;

Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774;

Holden v. American News Co., 52 Fed. Supp. 24, U. S. District Court E. D. W.

District of Washington, Northern Division;
Graham v. Star Publishing Co., 133 Wash. 387;
Byrne v. Funk, 38 Wash. 506;
Carey v. Hearst Publications, Inc., Vol. 119, No. 16 Washington Decisions, page 997;
Miles v. Wasmer, 172 Wash. 466; 20 Pac. (2d) 847.

In the *Ziebell* case, *supra,* the Court specifically passed upon the question of malice, and Judge Driver, in writing the opinion for the Court, stated at page 266:

"Malice is not an essential element of civil libel. *Wilson v. Sun Pub. Co.,* 85 Wash. 503, 148 Pac. 774,

Ann. Cas. 1917B, 442; *Hollenbeck v. Post-Intelligencer Co.,* 162 Wash. 14, 297 Pac. 793; *Blende v. Hearst Publications, Inc.,* 200 Wash. 426; 93 P. (2d) 733, 124 A. L. R. 549. But, aside from that, the publication proscribed as criminal libel in the cited statute, in so far as it pertains to living persons, also constitutes libel per se. As stated in *Graham v. Star Pub. Co.,* 133 Wash. 387, 389, 233 Pac. 625: '. . . any publication which falsely charges a person with the commission of a crime or comes with (in) Sec. 2424, Rem. Comp. Stat. (P. C. Sec. 8953), is libelous per se. . . .'

"In *Wilson v. Sun Pub. Co., supra,* Judge Ellis, the author of the opinion, commented on this statute as follows:

" 'Eliminating the statutory element of malice, either actual or implied, an essential only of criminal libel, this definition meets the essentials of libel actionable per se as generally recognized in civil actions for damages. Newell, Slander and Libel (2d ed.), p. 43.' "

In the *Graham* case, *supra,* the defense urged was a qualified privilege and that in the absence of malice the publisher could not be held liable for damages. The Court in passing upon this stated at page 391:

> *"The privilege ends when falsity begins, and if, as the complaint alleges, the charge is false, the privilege, if there was one, was therefore exceeded."*

The above case has been cited with approval by later decisions of the Supreme Court of the State of Washington, and has been cited in the *Ziebell* case, *supra,* and again in the very recent case of *Carey v. Hearst Publications, Inc., supra.* It is respectfully submitted

that this is particularly applicable to the instant case and that under the decisions of the State of Washington, the defendant had no privilege whatever, the defamatory matter in the instant case being libelous *per se* and wholly false.

Clearly, therefore, under the decisions of the Supreme Court of the State of Washington, plaintiff should not have been required to prove malice in order to defeat the alleged defense of privilege and the good faith of defendant in publishing the libel was wholly immaterial. The courts have repeatedly held that even though a person repeats a libel heard and names his authority he nevertheless is responsible for it.

> 33 Am. Jur. Sec. 95, p. 105;
> *Lathrop v. Sundberg,* 55 Wash. 144; 104 Pac. 176.

In his opinion in the *Holden* case, upon which Judge Schwellenbach has predicated his ruling in the instant case, an effort was apparently made to reconcile the decisions of the state Supreme Court of Washington on the subject of privilege and the duty of proving malice, in libel cases. In doing so, Judge Schwellenbach has overlooked the cardinal rule for Federal District Court judges who are passing upon matters controlled by the opinion of the Supreme Court of the state in which the Federal District Court is situated. He points to two "irreconcilable" positions taken by the Washington Court on the subject in hand, and states that the Washington Supreme Court has never attempted

to reconcile the apparent contradictions of its several opinions upon the subject.

It is by no means conceded that the decisions of the Supreme Court of Washington are in hopeless confusion on this subject. Rather it is urged that the Supreme Court of Washington long ago, and even in its latest expression laid down after the filing of Judge Schwellenbach's opinion in the *Holden* case, has definitely committed itself to the rule that no privilege exists in those cases of libel and slander where the defamatory words are actionable *per se,* and untrue.

What Judge Schwellenbach actually did in the *Holden* case was to seek solace in the language of *Ecuyer v. New York Life Insurance Company,* 101 Wash. 247, and disregard every expression of the Washington Supreme Court laid down thereafter by decision on the same subject. As illustrative of this reference is respectfully directed to the case of *Hollenbeck v. Post-Intelligencer Co.,* 162 Wash. 14, 297 Pac. 793. The following is quoted from the opinion:

> "The theory of respondent is that the article was qualifiedly privileged. It contends that, in the absence of malicious and deliberate use of false and libelous matter, respondent is not liable. Great reliance is placed by respondent on the decisions in *McClure v. Review Publishing Co.,* 38 Wash. 160, 80 Pac. 303; *Chambers v. Leiser,* 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270; *Dayton v. Drumheller,* 32 Ida. 283, 182 Pac. 102, and 37 C. J. 33, to the effect that, if the averments of a complaint discloses facts constituting a qualified privilege, express malice must be averred."

The *Dayton v. Drumheller* case was a leading Idaho authority supporting this proposition

The Washington Supreme Court, continuing in the *Hollenbeck* case, stated:

> "The rule in this state, contrary to what was said in the *Dayton* case, *supra,* is that malice is immaterial in a civil action for libel, when the article necessarily tends to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or to injure any person, corporation or association of persons, in his or their business or occupation."

The case of *Graham v. Star Publishing Company,* 133 Wash. 387, is and has since its announcement been landmark authority in libel cases for the proposition that:

> "The privilege ends when falsity begins, and if, as the complaint alleges, the charge is false, the privilege, if there was one, was therefore exceeded."

In the instant case the libel case was confessedly false; in fact no effort was made by the defendant to pretend to prove its truth. It was manifestly libelous, *per se,* because it charged the appellant with being a "check artist," which has only one definition in common parlance.

The answer to this situation, so far as the substance of instructions to the jury may have bearing upon the ultimate determination of this appeal may be found in *Carey v. Hearst Publications, Inc., supra.* There privi-

lege was claimed on the ground that the newspaper was reporting a judicial proceeding, and the Court said:

> "Truth of a story, libelous per se, is a complete defense. If the story be false, however, qualified privilege does not absolve the publisher even though the charges be made in good faith." (p. 701, published opinion)

In his opinion in the *Holden* case Judge Schwellenbach said:

> "The phrase 'the privilege ends when falsity begins' is attractive but dangerous because of its very attractiveness. * * *"

The *Holden* opinion quotes further from Mr. Justice Frankfurter in *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54, 68, who used some glittering verbiage when he stated:

> "* * * an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; * * * and repetition soon established it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas. * * *"

However persuasive this discussion of the inept use of words in the law may have appeared to the writer of the opinion in the *Holden* case, the Washington Supreme Court remained uninfluenced when it later handed down its opinion in the *Carey* case; for after citing their prior opinions in *Graham v. Star Publishing Co., supra,* and *Hollenbeck v. Post-Intelligencer Company, supra,* they quoted again with approval the language

used in the two cases; namely, "The privilege ends when falsity begins, and if the charge is false, the privilege, if there was one, was therefore exceeded."

Continuing in the *Carey* case, the Washington Supreme Court said:

> "The article was libelous, *per se*. If false, its publication did not fall within the rule of qualified privilege. In such case, it is not necessary to prove malice. *Miles v. Louis Wasmer, Inc., supra.*
>
> "The appellants requested an instruction as follows:
>
> " 'When a newspaper merely reprints a dispatch sent from a distant city by a reputable news service, that newspaper is not held to the same responsibility for the truth of the report published as in instances when a newspaper's own reporters gather the news and write the story.'
>
> "The court rejected the request, and, instead instructed the jury that the fact the article was a news item received from the Associated Press 'does not constitute either excuse or justification.' Appellants' request finds support in the case of *Layne v. Tribune Co.,* 108 Fla. 177, 146 So. 234, 86 A. L. R. 466. That decision, however, appears to be against the weight of authority. The prevailing rule in this country was epitomized by Mr. Justice Holmes in *Peck v. Tribune Co.,* 214 U. S. 185, 189, 53 L. Ed. 960, 29 S. Ct. 554, 16 Ann. Cas. 1075: 'If the publication was libelous the defendant took the risk. As was said of such matters by Lord Mansfield, "Whatever a man publishes, he publishes at his peril." ' *Schuyler v. Busbey,* 68 Hun. 474, 23 N. Y. Supp. 102 (affirmed 142 N. Y. 680, 37 N. E. 825); *Sanders v. Times-Picayune Pub. Co.,* 168 La. 1125, 123 So. 804; *A. H. Belo & Co. v. Smith,* 40 S. W. 856 (affirmed 91 Tex. 221, 42 S. W. 850). In 39 Am.

Jur. 20, Sec. 32, the rule is cited as follows:

"'It is ordinarily held that the publication of defamatory matter by a newspaper is not privileged by reason of the fact that it is copied from another publication, or comes through the regular channels of news collection, without any notice of its falsity, and that the newspaper publishing it is liable in damages to the person libeled, in the absence of other justification.'

"The principle stated was applied in *Miles v. Louis Wasmer, Inc., supra.* Remoteness of the source of a defamatory article does not serve to diminish its harmful effect nor to mitigate the damage caused by it."

3.

Plaintiff at the trial of this action submitted testimony of the repetition by third persons of the libel and requested an instruction that defendant was liable for the injurious consequences of the repetition of the libel by third persons where such repetition was the natural and probable result of the original publication. (Plaintiff's Requested Instruction No. 9 (R-42)).

Instruction No. 9

"I further instruct you that one who publishes defamatory matter is liable for the injurious consequences of the repetition thereof by third persons where such repetition is the natural and probable result of the original publication.

33 Am. Jur. Sec. 197, p. 185."

The Court refused to so instruct and refused to permit plaintiff to introduce testimony respecting the foregoing. It is respectfully submitted that the refusal to give this requested instruction constituted reversible

error, as the Courts have held that the testimony of repetition by third persons of the libel were properly admissible and whether or not the secondary publication was the natural and probable consequence of the original defamation, which could have been anticipated, was a question for the jury. In the instant case, it is respectfully submitted, that by reason of the tender age of the various sales girls employed, the defendant should have anticipated that they would repeat and republish the libel.

In the case of *Sawyer v. Gilmers, Inc.,* 126 S. E. 183, 189 N. C., reported in 41 A. L. R. 1184, the Court permitted testimony respecting the repetition and circulation of the libel and in its opinion (41 A. L. R. p. 1189) stated as follows:

> "Defendants contend that it was error to admit as evidence the testimony of repetitions of the slanderous words alleged to have been uttered by defendants. This contention is presented by exceptions to questions addressed to and to answers made by plaintiff and witness Abner Pope. His Honor expressly instructed the jury that—
>
> "This 'testimony was not evidence on the question as to whether or not the defendant Beavers actually accused plaintiff of stealing, but was to be considered by the jury as evidence only upon the question as to whether or not plaintiff's general reputation had been damaged as a result of such words.'
>
> "The evidence was competent for the purpose to which his Honor thus limited it, and the assignments of error based on these exceptions are not sustained."

In the case of *Merchants' Ins. Co. v. Buckner,* 98 Fed. 222, a similar situation arose, and the Court permitted testimony showing the witness heard the libel discussed, and that it was generally known. The Circuit Court of Appeals for the Sixth Circuit in the *Merchants' Insurance* case, in reversing the judgment of the Court below and remanding the case for new trial, stated as follows:

> "A recovery may be had for such publication of the libel as is a natural consequence of putting the letter into circulation. It is a question of fact for the jury to say how far the circulation proven of the charges in question is a natural consequence of the sending of the letter by the manager of the insurance company to the secretary of the local board. The learned judge who presided, as we have seen, directed the jury to consider the circulation of the libelous words by members of the board or others, without requiring the jury to find that such circulation was a natural consequence of the act of sending the letter containing the libelous matter to the secretary. We are of the opinion that this was substantial error. It gave the jury a wrong basis upon which to award damages, which might be quite prejudicial to the plaintiff in error. For error in the charge in this respect, the judgment below is reversed and the case is remanded for new trial."

Thus the Circuit Court of Appeals in this case held such testimony would be admissible, and that it was a question for the jury to say how far the circulation was a natural consequence of the original libel.

Sawyer v. Gilmers, Inc., again on page 1190 the Court stated as follows:

> "If the defamation is uttered under such circumstances as to time, place, or conditions as that a

> repetition or secondary publication is the natural and probable consequence of the original defamation and damage resulting therefrom, he is liable for such damage and evidence of such repetition or secondary publication and of damages resulting therefrom is admissible. It is for the jury to determine, under instructions of the court, whether, in view of the circumstances under which the original defamation was uttered, a secondary publication or repetition was the natural and probable consequence of such defamation which could and should have been foreseen or anticipated by the defendant in an action for damages for the original defamation."

As pointed out in the *Suick v. Krom* case, Wis. 254, 177 N. W., 20, 41 A. L. R. 1191:

> "The extent to which the incident was discussed among plaintiff's friends and neighbors contributed to her disgrace, increased the injury to her feelings, and injuriously affected her reputation. We think it was proper for the jury, in determining the amount of damages, to take into consideration the extent to which the fact that the accusation had been circulated among plaintiff's friends and neighbors, excluding, of course, the circulation for which she was responsible."

It is respectfully submitted that by virtue of the peculiar nature of libel, the extent of the repetition and circulation of the libel must necessarily be proven by persons to whom the libel has been imparted. This becomes particularly significant with respect to the manner and method of the publication adopted by the defamer. Manifestly, if the method of publication is one in which no care is exercised to restrict the publication to any particular persons, but is exhibited in such

a manner as to cause it to come to the attention of persons not connected with the business of the defendant, as in the instant case, the extent of such circulation and repetition becomes extremely important, and under the foregoing authorities is a question for the jury as to how far such circulation was a natural consequence of the original libel.

Plaintiff sought to introduce testimony as to the circulation and repetition of the libel, and upon the sustaining of objections thereto submitted an offer of proof along this line (R-28, 29).

It is respectfully submitted, therefore, that the refusal of the Court to permit plaintiff-appellant to introduce testimony respecting the circulation and repetition by third persons of the libel complained of constitutes reversible error.

4.

The Court erred in overruling plaintiff's objection to the testimony of defendant's witness, E. J. Hummer, wherein he stated that the plaintiff was the party against whom he had made a complaint. We feel that whether the witness, Hummer, made a complaint was wholly immaterial and incompetent and should have been excluded from the testimony adduced at the trial.

It is further respectfully submitted that the Court erred in overruling plaintiff's objection to the testimony of Richard Dunning wherein he testified that the photograph of plaintiff, Exhibit A, wherein he was portrayed as a "check artist" had been received from the

Police Department of the City of Spokane, and in turn delivered by him to defendant and other merchants. We feel that this testimony should have been excluded as the good faith of the defendant or the fact that the defamatory material may have been received from some other person or agency does not exclude or relieve defendant from liability, and that the Court did further err in refusing to give plaintiff's requested Instruction No. 5 (R-41).

33 Am. Jur. Sec. 95, page 107.

See cases cited under I and II of Argument. this brief.

5.

The last expression of the Supreme Court of Washington, particularly where it is plain that some of the prior opinions of the Court on the same subject are in contradiction, is the rule which is binding upon the Federal Courts under the fundamental rule expressed *found in Erie Railroad Co. v. Thompkins,* 304 U. S. 64.

The State of Washington has held in the case of *Puget Mill Co. v. Kerry,* 183 Wash. 542, 49 Pac. (2d) 57, that where there are two cases having inconsistent decisions, the later one must be taken as controlling and the Court in its opinion stated at page 559:

> "In the earlier case of *Harvard Investment Co. v. Smith,* 66 Wash. 429, 119 Pac. 864, it is possible that a different rule was laid down. The case last cited was not referred to in the case of *DeLano v. Tennant, supra,* and, in so far as any inconsistency may exist between the two cases, the older case must be held to have been overruled by the later, which

we are convinced correctly declares the law."

As stated in 14 Am. Jur. Section 103, page 323:

> "*Effect of conflicting state decisions.* If there is any conflict in the decisions of the state tribunals, the general rule is that the latest settled adjudications will be followed in preference to the earlier ones."

In the case of *Abraham v. National Biscuit Co.* (C. C. A. 3rd) reported in 89 Fed. (2d) 266, 111 A. L. R. 1313, the Court stated:

> "We understand the true rule to be that when the decisions of the highest court of a state construing a state statute are in conflict the Federal Courts will follow the latest settled adjudication of the state Supreme Court, rather than the earlier ones, except in cases where contracts have theretofore been entered into, or rights or title acquired on the faith of the earlier decisions. See *Jackson v. Harris* (C. C. A. 10th) 43 Fed. (2d) 513, pages 516, 517, in which case the authorities are collected. * * *"

The United States Supreme Court has held to like effect and it is respectfully submitted that it is the settled law of the country that where decisions are in conflict the national courts always follow the latest adjudications of the highest court of the state rather than the earlier ones.

Bauserman v. Blunt, 147 U. S. 647;

Wade v. Travis County, 174 U. S. 499;

Practice Conformity Act, 28 U. S. C. A. Sec. 724;

State ex rel. Attorney General v. Irby, 81 S. W. (2d) 419;

Jolley v. Clemens, 82 Pac. (2d) 51;

Libby v. Southern Pac. Railway, 219 Pac. 604.

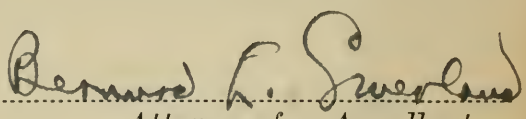
That the Federal Courts must now follow the state decisions on questions of unwritten or common law has become so well settled by the case of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, that plaintiff will not burden the Court with any further discussion on this phase of the matter.

14 Am. Jur., Section 90, page 303;

Madden v. Commonwealth of Kentucky, 309 U. S. 83.

Therefore, a single reading of the *Carey* opinion (*Carey v. Hearst Publications, Inc.,* Vol. 119, Wash. Dec., 997), we respectfully submit, calls for a reversal of this case and a remand for retrial.

For all of the reasons set forth in this brief, appellant respectfully submits that the judgment of the United States District Court in said cause should be reversed and the case remanded to the United States District Court for retrial.



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